IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
CIVIL APPLICATION NO.744 OF 2005
IN
APPEAL FROM ORDER NO. 629 OF 2005

WITH

CIVIL APPLICATION NO.745 OF 2005
IN
APPEAL FROM ORDER NO. 631 OF 2005

Shyam Bhajanmal Luthria & anr. Applicants

Vs.

Elel Hotels & Investments Ltd. & ors. Respondents

Mr.Aspi Chinoy, Sr.Counsel with Mr.V.R.Dhond and Mr.P.K.Shroff i/b M/s. Negandhi, Shah & Himayatullah for applicants.

Mr.I.M.Chagla, Sr.Counsel with Mr.D.J.Khambatta for Resp.No.1.

Mr.Navroz Seervai for Resp.Nos.2 to 6 & 11.

Mr.Janak Dwarkadas, Sr.Counsel with Mr.Shyam Mehta i/b M/s.Desai & Diwanji for Resp.Nos.14 to 21.

Mr.Sunip Sen and Mr.Naushad Engineer for Resp. Nos.7 to 9 and 12.

CORAM: B.H.MARLAPALLE,J.
July 18, 2005.

ORAL ORDER:

1. Heard. In both these applications filed in two different appeals i.e. Appeal from Order No.629 of 2005 and Appeal from Order No.631 of 2005 interim reliefs have been prayed. The learned Vacation Judge

on 2nd June 2005 after hearing the concerned parties had directed status quo as on that day to be maintained till the applications were heard by the regular Court after reopening. The status quo order was to continue till 10-6-2005 and thereafter the said order has been continued.

2. The defendant no.1-company i.e. Elel Hotels & Investments Ltd. came to be incorporated sometime in the year 1969 with the object to own and construct and carry on business of running hotel Sea Rock Sheraton and at that time shareholders were from four Luthria families alone. It was converted into a Public Limited Company on 30-4-1976 but the share holding was again within the members of the said family i.e. Shyam, Kishore, Girdhari and Deepak. About 70% holding of the defendant no.1 - company belongs to Udhram and Girdhari Luthria. In the year 1991 all the four families formed four different holding companies and the respective shares were transferred to these Private Limited Companies. The Plaintiff no.1 formed plaintiff no.2 and defendant nos.2, 3 , 4, 5 and 6 formed defendant no.11 and defendant nos.7, 8, 9 and 10 formed defendant no.12. Prior to this reorganisation of ownership, operating

licence agreement was entered into between the defendant no.1 and ITC Ltd. on 3rd May 1986 for the management of Hotel Sea Rock for initial period of 25 years with an option conferred upon ITC (Indian Tobacco Co.) to renew the licence for a further period of 25 years. ITC in turn had agreed to pay licence fee to defendant no.1 at the rate of 23 % on gross turn over in each financial year. Pursuant to the said agreement the management of Hotel Sea Rock was handed over to ITC.

3. On 12th March 1993 bomb blasts in Mumbai had affected large number of structures and so was hotel Sea Rock which was badly damaged. Consequently the operations of the hotel were seriously affected. Disputes arose between Defendant No.1 and ITC with regard to the maintenance, repairs and running of the hotel and this led to filing of suits by ITC as well defendant no.1-company against each other. Disputes were referred to arbitration wherein ITC claimed Rs.1500 crores and defendant no.1 claimed Rs.500 crores by way of recoveries from each other.

4. In Company Petition No.42 of 1996 a consent order was passed by the Company Law Board whereby the

plaintiffs were allowed to sell 26 % share holding in defendant no.1-company to any person other than ITC and accordingly on 17-9-2004 the plaintiffs signed an agreement to sell their shareholding in defendant no.1-company to M/s.Sky Deck Properties & Developers Pvt.Ltd.

5. On 4-11-2004 an MOU came to be signed between Respondent Nos.1 to 9, Respondent Nos.11, 12 and 14. This MOU was for purchase of 4% of the equity of respondent nos.11 and 12 which in turn held 70% of the share holding of the defendant no.1-company. It was further agreed that defendant no.14 would deposit a sum of Rs.50 crores into escrow account towards the settlement of ITC dispute.

6. The plaintiffs approached the City Civil Court and filed S.C. Suit No.1521 of 2005 on or about 21st March 2005 alleging that the proposed transfer of shares by the defendant nos.2 to 9 and 11 and 12 was in breach of Article 29 of the Articles of Association of Defendant no.1. On 22-3-2005 Notice of Motion No.1254 of 2005 was moved and after hearing the plaintiffs, defendant nos.2 to 12 were restrained from selling or in any manner transferring their

shares in Respondent Nos.11 and 12 to any person contrary to Article 29 of the Articles of Association and restraining respondent no.1 from registering such sale or transfer. On 28th March 2005 the defendants pointed out that the MOU dated 4-11-2004 was replaced by share purchase agreement dated 11th January 2005 and the transaction of transfer of shares of defendant nos.11 and 12 in favour of defendant no.14 was completed. The plaintiffs took out fresh Notice of Motion No.1255 of 2005 on which the trial Court directed to maintain status quo in respect of the said shares until further orders. On 4/4/2005 plaintiffs took out Notice of Motion No.1444 of 2005 to restrain defendant no.1 from entering into any settlement with ITC. This Notice of Motion was dismissed by the trial Court on the ground that the settlement of the dispute with ITC would not affect the rights of the plaintiffs. The said order is under challenge in A.O. No.489 of 2005. On 12th April 2005 the plaintiffs filed rejoinder in Notice of Motion No.1254 of 2005 and contended that the share purchase agreement was not referred to on 28th March 2005 or on 7th April 2005 before the trial Court and thus it was alleged that the defendants were making contradictory and inconsistent

statements. On 13th April 2005 Notice of Motion No.1548 of 2005 was moved seeking again injunctions for the purported transfer of shares of defendant nos.11 and 12. While opposing the applications for ad-interim reliefs the defendants objected to the pecuniary jurisdiction of the trial Court and vide order dated 2-5-2005 the plaint came to be returned to the plaintiffs on the ground that the trial Court had no pecuniary jurisdiction to try the suit. It was further held that the suit was not correctly valued and the plaintiffs would value the suit correctly. Application for ad-interim reliefs i.e. Notice of Motion No.1548 of 2005 was rejected on account of lack of jurisdiction to entertain the suit. Being aggrieved by this order dated 2-5-2005 two separate Appeals have been filed before this Court i.e. A.O.No.629 of 2005 and A.O.No.631 of 2005.

7. While admitting both these appeals the learned Vacation Judge vide his order dated 20-5-2005 has granted ad-interim reliefs and on the same day the Hotel Operator Agreement dated 11-5-2005 was placed on record before this Court. These two applications emanate from the said agreement dated 11-5-2005.

Though they have been filed in two different appeals as noted earlier the reliefs claimed are common and they read as under:

> "(b) pending the hearing and final disposal of the present Appeal from Order, this Hon'ble Court be pleased to restrain Respondent Nos.1 and 14, their servants and agents by an Order and injunction of this Hon'ble Court from taking any further steps under the Hotel Operator Agreement dated 11th May, 2005 or exercising any right under the said Agreement and the Respondent No.1 and 14 to maintain the status-quo with respect to the said Sea-Rock Hotel at Byramjee Jeejeebhoy Road, Band Stand, Bandra (West), Mumbai 400 054;
>
> (c) pending the hearing and final disposal of the present Appeal from Order, this Hon'ble Court be pleased to restrain Respondent Nos.14 to 21, their servants and agents from acting as Directors of Respondent Nos.11 and 12 Company;
>
> (d) pending the hearing and final disposal of the present Appeal from Order, this Hon'ble Court be pleased to appoint Court Receiver, High Court, Bombay or some fit or proper person as Receiver of the said Sea-Rock Hotel situate at Byramjee Jeejeebhoy Road, Band Stand, Bandra (West), Mumbai 400 054 with all powers under Order XL Rule 1 of the Code of Civil Procedure, 1908;"

8. The defendants have filed affidavits-in-reply and opposed these applications. The learned senior counsel in his arguments in support of the applications submitted that on 10-5-2005 the learned Vacation Judge in A.O.489 of 2005 had passed

ad-interim orders and the statement made by the learned counsel for the defendant no.1 in the order dated 19-4-2005 was referred to the effect that the amount received from the purchaser would not be utilised to settle the dispute with ITC consequent to the MOU dated 4-11-2004. This Court noted that on 19/4/2005 it was not pointed out to the Court that agreement dated 11th January 2005 was independent of the memorandum dated 4th November 2004 and under these circumstances the defendant no.1 was restrained from entering into any settlement in favour of ITC by utilising the amount received from the purchasers under the agreement dated 11th January 2005. It was further pointed out by the learned Sr.Counsel that the order dated 20-5-2005 also acted another major hurdle for transferring the management of Sea Rock Hotel to defendant no.14 and when all the avenues were blocked, the defendants resorted to the Hotel Operator Agreement dated 11-5-2005. It was contended that this was not a bona fide transaction, not in the interest of the share holders of the defendant no.1-company and in any case it was solely to by-pass the orders passed by the trial Court as well as this Court from time to time in the pending appeals. As per the plaintiffs, it was necessary to appoint Court

Receiver and put the Sea Rock Hotel in his possession during the pendency of the appeals and the agreement dated 11-5-2005 should not be allowed to operate.

9. Mr.Chagla, Mr.Dwarkadas and Mr.Seervai, the learned counsel for the defendant no.1-company, defendant no.14 and defendant nos.11 and 12 respectively by referring to the respective affidavits-in-reply submitted that these applications were required to be rejected and there was no case to stop in any way the hotel operator agreement from being operated. It was pointed out that the hotel management has already been transferred to defendant no.14 pursuant to the said agreement and it was made known to this Court on 20-5-2005 itself. The Court did not pass any orders except noting down the statement made by the learned senior counsel for the plaintiffs that they would take out appropriate proceedings to challenge the validity of the said agreement.

10. I am required to consider whether there is a prima facie case made out by the plaintiffs to grant reliefs as prayed for in these applications. My findings are in the negative and for the reasons set

out hereinbelow.

11. Admittedly the transaction under challenge before the trial Court was transfer of shares of defendant nos.11 and 12 in favour of defendant no.14. These are all independent legal entities like defendant no.1. The appeals filed by the plaintiffs have been admitted by this Court and for the sole consideration whether the suit was barred by pecuniary jurisdiction. The outcome of the appeals is uncertain in asmuchas the final decision in the appeals could go either way. Under such circumstances any interlocutory order must protect the interests of the parties concerned and it should not disturb the existing rights of any of the parties. On 2-6-2005 the learned Vacation Judge directed the status quo as on that day to be maintained and as a result thereof, as per the Defendants, Hotel Sea Rock is being managed by defendant no.14 as at present.

. Even if it is presumed for the argument's sake that the plaintiffs would succeed in the pending appeals, the suit would be restored and the plaintiffs would have to still answer the following

legal questions:

. (a) Applicability of Article 29 of the Articles of Association of Defendant no.1 to the transfer of shares of defendant nos.11 and 12; (b) Locus standi of the plaintiffs to challenge the said transaction on account of their having signed an agreement for sale of their entire share holding to Sky Deck Properties Pvt. Ltd. and secondly on account of their being not share holders of defendant nos.11 and 12. After these legal issues are decided, then only the suit could proceed on merits.

12. On 18-5-2005 itself Mr.Deepak Luthria in his capacity as authorised officer of plaintiff no.2 placed an affidavit on record in Civil Application No.727 of 2005 and prayed for the following relief:

> "Respondent No.1 and/or Respondent Nos.2 to 21 be restrained by an Order and injunction of this Hon'ble Court from taking any further steps in respect of the said Sea-Rock Hotel situate at Byramjee Jeejeebhoy Road, Band Stand, Bandra (West), Mumbai 400 050 and not to change the status-quo in respect of the said hotel in any manner whatsoever."

An ad-interim relief in terms of the above relief was also prayed for along with such further and other

reliefs as this Court may deem fit and proper in the nature and circumstances of the case. While passing the order dated 20-5-2005 the learned Vacation Judge did not consider it appropriate to pass any order relating to the Hotel Operator Agreement.

13. The defendant no.1 in its affidavit-in-reply to these applications has set out the events leading to this agreement. In the meeting of the Board of Directors of Defendant No.1 held on 29-4-2005 it was noted that ITC was agreeable for settling the dispute on payment of Rs.43.10 crores subject to certain terms and conditions and legal compliances. The board of defendant no.1 felt that it would be advisable for the company to settle the disputes as soon as possible so as not to further burden the company or prolong various litigations with ITC. The terms of settlement were finalised by the Board. The Chairman placed before the board the full proposal received from defendant no.14 for management licence. The draft of hotel operator agreement was discussed. Mr.Sanjeev Nanda and Mr.Bipin Shah excused themselves from the said discussions in relation to the funding of ITC settlement. The board resolved to proceed with the hotel operators agreement as proposed by

defendant no.14 who also had agreed to pay an amount of Rs.43.25 crores as interest free security deposit so as to utilise for the purpose of ITC settlement. This amount was to be provided independent of the transaction of the shares purchase by defendant no.14 from defendant nos.11 and 12. It was specifically noted that defendant no.14 would give royalty compensation at the rate of 23% on net sales turn over to defendant no.1. It would also finance refurbishing, renovation and reconstruction of the hotel. Initial contract would be for a period of 25 years renewable for a further period mutually acceptable. The hotel operator agreement was ratified in the meeting held on 12th May 2005 by the Board of Directors of the defendant no.1. The terms of agreement are on the lines of the resolutions passed by the Board of Directors and they are in no way less favourable than the terms set out in the similar agreement with ITC. The resolutions passed are commercial decisions taken by the board of defendant no.1-company and whether the said board was validly constituted or not is not an issue at this stage.

14. Regards must also be had to the fact that the

plaintiffs are the minority share holders to the extent of 26% and the majority holding is still with defendants so far as defendant no.1-company is concerned. Corporate democracy requires that the majority decisions taken in the management and administration of a company are not interfered as far as possible unless of course the competent forum finds such decisions to be suffering from legal infirmities. In the pending appeals or in these applications there is no declaration sought against the said agreement. If the pending appeals are allowed the plaintiffs would still have a long way to go as noted hereinabove on legal issues. Prima facie it is difficult to accept the allegations of the plaintiffs that this agreement is an effort to by-pass the orders passed by this Court or the trial Court and that it smacks of any malice on the part of the defendants. It would be on the other hand in the interests of the shareholders that hotel Sea Rock is allowed to run so as to earn the agreed royalty i.e. 23% amount of the net turn over. To bring the operations of the said hotel to a stand still as prayed for in these applications is not in the interests of the share holders, the employees of the hotel as well as the corporate functioning.

15. Mr.Chinoy, the learned Senior Counsel appearing for the plaintiffs submitted that there should have been tenders invited before the subject agreement was signed with defendant no.14. Such an issue could be examined as and when there is a challenge raised to the validity of the agreement and it cannot be considered at this juncture. In any case the plaintiffs or their transferees are not prevented from taking up such an issue in the shareholders meeting or board meeting, in case they continue to be in such a capacity. The appointment of Court Receiver in respect of a running hotel or in respect of a running business is not called for. Mr.Dwarkadas, the learned senior counsel rightly referred in this regard to the decision in the case of Firm Ashok Traders v. Gurumukh Das Saluja reported in **(2004) 3 SCC 155**. The principles governing the grant of interim injunction have been reiterated in the case of Dhariwal Industries Ltd. v. M/s. M.S.S. Food products reported in **AIR 2005 SC 1999** and they are applicable to the instant case as well. In the case of Cotton Corpn. of India v. United Industrial Bank reported in **AIR 1983 SC 1272** their Lordships observed thus:

> "...An interim relief can be granted only in aid of, and as ancillary to, the main relief which may be available to the party on final determination of his rights in a suit or proceedings. If this be the purpose to achieve which power to grant temporary relief is conferred, it is inconceivable that where the final relief cannot be granted in the terms sought for because the statute bars granting such a relief ipso facto the temporary relief of the same nature cannot be granted."

The plaintiffs main submission has been that the documents leading to the proposed transaction of transfer of shares is based on fraudulent and suspicious documents and in breach of Article 29 of the Articles of Association of Defendant No.1. Mr.Dwarkadas referred to the decision in the case of Hansraj Gupta v. Dehra Dun-Mussoorie Electric Tramway Co. reported in **AIR 1940 Privy Council 98**.

The caveat in the said decision reads as under:

> "The party alleging fraud is bound to establish it by cogent evidence and suspicion cannot be accepted as proof. Unless therefore proved circumstances are incompatible with the hypothesis of the person charged with fraud having acted in good faith, they cannot be accepted as affording sufficient proof of fraud."

16. To conclude I am satisfied that there is no

case made out to either stay the Hotel Operators Agreement or for appointment of the Court Receiver of a running hotel and, therefore, no further orders are required to be passed in these applications. An apprehension was expressed during the course of arguments by Mr.Chinoy that the wide terms of the agreement are likely to permit defendant no.14 to reconstruct the hotel. Such terms are incorporated by keeping in mind the contingencies that may arise in future and it would be inappropriate to believe that the agreement is a licence to defendant no.14 to demolish the existing hotel and reconstruct the new one. All such commercial decisions will be within the domain of defendant no.1 and other defendants. However, it would be appropriate that if any major changes are sought to be made in the property of the hotel, the defendants will have to obtain leave from this Court during the pendency of the appeals including the transfer of ownership.

17. In the result, these applications fail and they are hereby rejected. However, it is directed that any major additions in the construction of hotel Sea Rock or its reconstruction shall be undertaken after seeking leave from this Court during the

pendency of these appeals. In addition, transfer of ownership of Hotel Sea Rock or any part thereof is prohibited during the pendency of these appeals.

18. The learned counsel for the plaintiffs submitted an oral application for continuation of the status quo order dated 2-6-2005 for a further period of three weeks. The learned counsel for the defendants have opposed the same prayer. However, as the status quo order has been operative till now, it would be appropriate that the plaintiffs are given some time to challenge this order and, therefore, the said status quo will continue for a period of three weeks from today. It is clarified that this status quo will not in any way affect the rights of defendant no.14 under the agreement dated 11-5-2005.

19. Certified copy is expedited.

(B.H.MARLAPALLE,J.)